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No.

In the Supreme Court

OF THE

United States

October Term, 1984

DEL MONTE CORPORATION, A New York corporation,
R. J. REYNOLDS INDUSTRIES, INC., a Delaware corporation,
DEL MONTE SNACKS, INC., a California corporation,
Petitioners,

vs.

BARBARA BLAU, RAM BLAU, ANN MAYO and
RICHARD LINDGREN, individually and
on behalf of all other former employees of
DEL MONTE SNACKS, INC., similarly situated,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

(1) Did the Court of Appeals err in holding, contrary to rulings of the Fifth, Seventh, and Eleventh Circuits, that a procedural violation by an ERISA plan administrator which causes an employee no damage may give rise to a cause of action for benefits to which the employee would not otherwise be entitled under the plan?

(2) Where an ERISA severance plan provides for benefits when an employee's "position" is "eliminated," may the plan administrator reasonable interpret the plan as not requiring payment of benefits when a business is sold as a unit and employment continues uninterrupted with the successor employer which has obligated itself to provide comparable benefits?

(3) Did the Court of Appeals err when it held, contrary to decisions of the Seventh and Eleventh Circuits, that a plan administrator's interpretation of an ERISA plan meets the "arbitrary and capricious" standard of review only if that interpretation is *required* by—as opposed to being reasonably permissible under—the language of the plan?[1]

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[1] The parties are named in the title of this petition. Other than the named parties, there exist no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates of any corporate party.

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OPINIONS BELOW

The opinion of the district court is unreported, and it is printed in Appendix A. The first opinion of the Court of Appeals is unreported, and it is printed in Appendix B. The amended opinion of the Court of Appeals is reported (748 F.2d 1348), and it is printed in Appendix C. The order on denial of rehearing and rehearing en banc is printed in Appendix D.

JURISDICTION

The amended opinion of the Court of Appeals for the Ninth Circuit was filed and entered on March 5, 1985 (Appx. C), and

its order denying rehearing was filed and entered on May 13, 1985 (Appx. D). This Court has jurisdiction pursuant to section 1254(1) of Title 28 of the United States Code.

STATUTORY PROVISIONS INVOLVED

This case involves the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq., and the Code of Federal Regulations. Pertinent portions of these (29 U.S.C. §§ 1001, 1022, 1024, 1102, 1103, 1104, 1132, 1144; 29 C.F.R. §§ 2510.3-1(a)(3), 2520.102-3, 2560.503-1) are set forth in Appendix E.

STATEMENT OF THE CASE

A. Statement of the facts

1. *The severance plan:* Granny Goose was a wholly-owned subsidiary of petitioner Del Monte Corporation, whose salaried, nonunion employees were eligible for coverage under certain pension and benefit plans, including Del Monte's voluntarily established and unfunded severance plan (ER 144, 178, 185, 187, 223, 457).[2] The objective of that severance plan was stated as follows:

> "This policy is established to provide a flexible and general guide for management in determining appropriate separation allowances for *employees whose positions are eliminated as a result of* reorganization, consolidation, or *elimination of operations to which they have been assigned* and for whom appropriate alternative employment opportunities are unavailable within the Corporation" (ER 238) (emphasis added).

2. *Application of the plan:* The intent of the plan was to provide severance benefits to employees who lost their jobs as a result of layoffs or plant closures (ER 236), and Del Monte's consistent practice has been to pay severance benefits to individuals whose positions are eliminated (ER 236). Between 1975 and the end of 1980 (when Granny Goose was sold), eight wholly-owned subsidiaries or operations were sold by Del Monte as going

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[2] Citations herein are to the excerpt of record (ER) and the clerk's record (CR) in the court below.

concerns (ER 236). In none of those instances were severance benefits paid to employees who continued their employment with the purchaser (ER 189, 236).

3. *The sale of Granny Goose:* Del Monte sold Granny Goose to a group of investors, with the purchase effective December 13, 1980 (ER 190, 453). Every salaried, nonunion employee on the Granny Goose payroll as of December 12, 1980 was continued in employment as of December 13, 1980, with the exception of four persons who previously had been Del Monte employees and who were offered employment with Del Monte (ER 138, 182-183, 210-211, 230). Plaintiffs all testified that they continued working at the same rates of pay, with the same basic responsibilities, after the sale (ER 132-135, 142-145, 176-177, 202-204, 219-221). There is no evidence that any Granny Goose employee lost even one day of pay because of the sale (ER 227).

4. *Employee knowledge of the severance plan:* Plaintiffs were aware that a severance plan existed and that there was a chart and a formula used to determine the amount of severance benefits (ER 381-382, 394, 429-430, 450). Although the written severance plan was not generally circulated to employees (ER 457), when the plan was read at depositions, plaintiffs testified that it stated the terms of the severance policy as they understood them (ER 397, 430, 434-435, 470).

Plaintiffs were aware that other employees had received benefits when they became unemployed (ER 137, 188, 228, 447, 465). Plaintiffs also were aware that subsidiaries other than Granny Goose had been sold as going concerns (ER 137), and they knew of no employee, whose employment continued, who had received severance benefits as a result of such a sale (ER 136, 229, 448, 469, 610, 611). Prior to the sale of Granny Goose, Del Monte advised plaintiffs, and it was generally known, that severance benefits would not be paid (ER 475-476, 482, 594).

5. *Continuation of employee benefits:* Under the contract of sale, the new owners of Granny Goose were obligated to establish "an employee welfare benefit program which is reasonably comparable to that presently in effect" (ER 196-197, 527), and they agreed to credit the employees with their accrued seniority (ER

195, 526). Accordingly, the new owners established, effective as of the date of sale, employee welfare benefit plans which were comparable to the Del Monte plans (ER 197).[3] Under the new severance plan, Granny Goose pays severance benefits to involuntarily terminated employees according to a formula which uses the employees' *original employment date* with Granny Goose (ER 180). Pursuant to this formula, one employee who left Granny Goose after the sale received approximately $26,000; another received approximately $13,000 (ER 181). No salaried nonunion employee of Granny Goose involuntarily terminated since December 13, 1980, has failed to receive severance benefits (ER 181).

B. The proceedings below.

Plaintiffs brought a purported class action against Del Monte in state court, contending that the sale itself entitled them to severance benefits even though their employment with Granny Goose continued (ER 1-13). The case was removed (28 U.S.C. § 1441) to federal court under ERISA (29 U.S.C. § 1132(e)(1)). After discovery, the district court granted Del Monte's motion for summary judgment, determining that, on the uncontroverted evidence, "the defendants' decision to deny the plaintiffs severance pay was not arbitrary or capricious, but was fully within the scope of the plan" (Appx. A, p. A3).

The Ninth Circuit reversed, holding that a procedural violation of ERISA may "work a substantive harm" even in the absence of monetary damage, that Del Monte's failure to comply with ERISA's procedural requirements of disclosure and reporting was "arbitrary and capricious," and that such "continuing procedural violations" were "highly probative" of whether a particular decision to deny benefits was itself arbitrary and capricious (Appx. C,

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[3] The Court of Appeals stated that Granny Goose employees retained "similar responsibilities and similar rates of pay, but somewhat different benefits" (Appx. C, p. A23). Although plaintiffs had made some conclusionary assertions that "differences" existed between the benefit plans, there was no evidence of such purported "differences." Moreover, when Del Monte sought discovery on the claim of "differences," plaintiffs blocked it as irrelevant (ER 209, 213-214, 450; C.R. 6).

pp. A28-A29). Applying a standard of review under which interpretation of a plan would be arbitrary and capricious as a matter of law unless that interpretation is *required* by the language of the plan, the court concluded that the denial of benefits was not "required" under the Del Monte plan (Appx. C, p. A29). Del Monte's consistent interpretation and application of the plan so as to deny benefits in similar past cases where the employment positions continued was held irrelevant because it had been "secret" (Appx. C, pp. A31-A32).

On May 13, 1985, the Court of Appeals denied a petition for rehearing; upon request by a judge in active service, a vote was taken on the suggestion for rehearing en banc, but a majority failed to vote for an en banc rehearing (Appx. D).

REASONS FOR GRANTING CERTIORARI

This case presents important questions regarding the interpretation and application of ERISA benefit plans. For a variety of reasons, not the least of which is the fact that ERISA is a relatively complex piece of litigation with rapidly changing case law and regulations, a number of employers have not fully complied with its procedural provisions. Accordingly, the courts are being required to determine how to treat those procedural violations. Until the decision of the Ninth Circuit, every court that passed upon the question had held that a procedural violation of ERISA gave rise to no cause of action for damages, absent some economic harm caused by the violation. The Ninth Circuit, however, has held that a procedural violation may itself cause a "substantive harm" and be the basis for an award of benefits *to which the employee would not otherwise be entitled.*

The decision of the Ninth Circuit also cries out for review because of its novel requirement that employees must be paid severance benefits when a business is sold as a unit, *even if the employees retain their positions after the sale.* Other employers have, as did the employer here, conditioned payment of severance benefits upon the termination of the *employment position.* If a business is sold intact as a unit and employment continues with the new employer (who in this case has established a similar

severance plan), no benefits are paid. Courts have approved such interpretations of severance plans as consistent with the policy against double recovery and ERISA's policy of keeping the costs of plans reasonable. Only the Ninth Circuit has found fault with such an interpretation, holding that an administrator's interpretation of an ERISA plan cannot be justified unless it is *required* by the language of the plan. This holding is in direct conflict with decisions of other Courts of Appeals under the "arbitrary and capricious" standard which uphold reasonable interpretations, even if not required by the plan's language.

Only this Court can put to rest the uncertainties created by the opinion of the Ninth Circuit, which has placed itself in direct conflict with other cases on point in this rapidly developing area of the law.

I

IN HOLDING THAT A PROCEDURAL VIOLATION MAY BE THE BASIS FOR AN AWARD OF BENEFITS TO WHICH AN EMPLOYEE WOULD NOT OTHERWISE BE ENTITLED, THE NINTH CIRCUIT HAS SANCTIONED A WINDFALL FOR EMPLOYEES AND PUT ITSELF IN CONFLICT WITH OTHER COURTS OF APPEALS

The Court of Appeals has held that an employee, relying upon a *procedural* violation of ERISA, may sue for damages and recovery of an award of benefits *even though that employee would not otherwise be entitled to the claimed benefits.* The court reached this startling result through sheer legal legerdemain. According to the court, a procedural violation may work "a substantive harm" and therefore, if plan administration is "riddled" with such violations, the denial of benefits may be arbitrary and capricious as a matter of law (Appx. C, pp. A28, A35). Although the court stopped short of holding that the denial of benefits in such a case would always be arbitrary and capricious, it nonetheless has opened a wide door by inviting suits for damages

each and every time that any employee is denied benefits and believes that he or she can allege a procedural violation.

In doing so, the Ninth Circuit lost sight of a basic principle of jurisprudence; it created a "remedy" where there exists no harm. Prior to the decision of the Ninth Circuit, courts had consistently—and sensibly—held that a procedural violation of ERISA may be the basis of a cause of action *if* it causes economic injury to the employee (*Wolfe v. J.C. Penney Co., Inc.*, (7 Cir. 1983) 710 F.2d 388, 393; *Paris v. Profit Sharing Plan, Etc.* (5 Cir. 1981) 637 F.2d 357, 362; *Petrella v. NL Industries, Inc.* (D.N.J. 1982) 529 F.Supp. 1357, 1370 ("There is no indication that Congress intended to create a cause of action for compensatory damages for failure to disclose"); *Grossmuller v. International Union, U.A.W.* (E.D.Pa. 1981) 511 F.Supp. 709, 710).[4]

The precise question before the Ninth Circuit has been faced recently by two other Circuits—and they have reached conclusions diametrically opposed to that of the Ninth Circuit. In *Anderson v. Ciba-Geigy Corp.* (11 Cir. 1985) 759 F.2d 1518, the employer clearly had failed to comply with ERISA. It had denied that its severance plan was an ERISA welfare benefit plan, and the summary did not disclose that benefits would not be paid when a business was sold as a unit (759 F.2d 1521). In response to the plaintiff-employees' argument that these procedural violations rendered the usual standard of review inapplicable, the Eleventh Circuit declared:

> "[T]here is simply no authority for the proposition that procedural errors in an ERISA plan's management requires something other than the arbitrary and capricious standard of review" (759 F.2d 1521).

Unlike the Ninth Circuit, the Eleventh Circuit did not hold, nor even suggest, that the procedural violations had resulted in

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[4] Indeed, the Ninth Circuit itself previously had indicated that a cause of action would lie upon a procedural violation of ERISA "assuming, of course, that the breach causes [the employee] some injury" (*Russell v. Mass. Mut. Life Ins. Co.* (9 Cir. 1983) 722 F.2d 482, 488, certiorari granted (1984) 52 U.S. Law Week 3235-3236).

some sort of amorphous "substantive injury" which in turn entitled employees to an award of benefits. To the contrary, the Eleventh Circuit stated that the *sole* issue in application of the arbitrary and capricious test was whether the decision " 'was made rationally and in good faith—not whether it was right' " (759 F.2d 1522).[5]

The same result was reached by the Seventh Circuit in a similar situation. In *Sly v. P. R. Mallory & Co., Inc.* (7 Cir. 1983) 712 F.2d 1209, the severance plan "was an internal policy statement" not generally circulated to employees (712 F.2d 1210, fn. 1, 1212). The court did not hold that such a procedural violation entitled employees to any extraordinary remedy, such as that created by the Ninth Circuit. Rather, it adhered to the established interpretation of the arbitrary and capricious test under which the administrator's decision prevails unless "it was 'arbitrary, fraudulent, or in bad faith' " (712 F.2d 1211).[6]

What the Ninth Circuit has done here is to create a legally-sanctioned form of "double dipping." Plaintiffs have not, and they cannot, point to any injury *caused* by the procedural violations in

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[5] Ironically, the Eleventh Circuit cited the decision below for the proposition that, "in a case where ERISA's provisions were 'flouted' in a 'wholesale and flagrant manner,' the arbitrary and capricious standard was still applied" (759 F.2d 1521). As discussed, however, the opinion of the Ninth Circuit goes much further, holding that the procedural violations themselves may give rise to a cause of action even in the absence of economic harm.

[6] The Ninth Circuit purported to distinguish this decision on the ground that the Seventh Circuit had "accepted the district court's determination" of employer good faith and therefore "had no occasion to determine whether that plan was infected with arbitrary and capricious administration" (Appx. C, p. A29, fn. 1). However, *Sly*, as the decision below, was an appeal from a grant of summary judgment, and therefore the question presented—whether there was evidence that interpretation of the plan was arbitrary and capricious—was precisely the same. Contrary to the Ninth Circuit attempted rationalization, the Seventh Circuit did not just "accept" the district court's determinations; it agreed with them (712 F.2d 1211-1213).

this case.[7] The record is clear that the new owners of Granny Goose adopted a severance plan, utilizing the employees' original dates of employment with Granny Goose, and that the new owners *have paid substantial benefits under that plan.* Under these circumstances, the words of the Seventh Circuit are apt:

> "To award severance benefits under these facts would result in a windfall to employees who retained their positions with the purchaser of the going concern, which was clearly not the intention or goal of either the [severance plan] or of ERISA" (*Sly v. P. R. Mallory & Co., Inc.* (7 Cir. 1983) 712 F.2d 1209, 1211; and see *Jung v. FMC Corp.* (9 Cir, 1985) 755 F.2d 708, 714 ("[P]olicy considerations behind ERISA suggest that double recovery should not be favored").

By permitting these plaintiffs to sue for "severance" damages not required by the plan here in issue, the Ninth Circuit has opened a Pandora's box of needless employee "remedies" under ERISA. Equally important, the Ninth Circuit has provided a strong incentive to employers to discontinue voluntary, unfunded programs such as the severance plan here at issue or else face the risk of having to pay, because of irrelevant procedural violations, benefits to employees not otherwise entitled to them.[8]

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[7] In a brief below, plaintiffs did assert that they had declined offers of other employment and stayed in Granny Goose's employ, but there was no evidence of such offers or that plaintiffs were in any way injured by staying in their employment.

Nor could any suggestion be made that asserted procedural violations themselves caused "injury" in the form of denial of benefits. The denial of benefits results from interpretation of the plan, not from any claimed procedural violations.

[8] It is well settled that an employer faces no liability for complete elimination of voluntary, unfunded and nonvested ERISA plans (e.g., *Sutton v. Wierton Steel Div. of Nat. Steel Corp.* (4 Cir. 1983) 724 F.2d 406, 410-411).

II

BY REJECTING AS "ARBITRARY AND CAPRICIOUS" ANY INTERPRETATION OF AN ERISA PLAN WHICH IS NOT REQUIRED BY THE LANGUAGE OF THE PLAN, THE NINTH CIRCUIT HAS SUBSTITUTED ITS JUDGMENT FOR THAT OF THE PLAN ADMINISTRATOR AND HAS PLACED ITSELF IN CONFLICT WITH OTHER COURTS OF APPEALS WHICH HAVE PASSED UPON THE APPLICABLE STANDARD OF REVIEW

The Ninth Circuit did not stop with creation of a new cause of action under ERISA; it also redefined the "arbitrary and capricious" test itself. According to the court, a plan administrator acts arbitrarily and capriciously if it applies an interpretation "not *required* by the severance policy" (Appx. C, p. A29) (emphasis added). This novel holding removes from a plan administrator any discretion to *interpret* the plan and, in effect, substitutes a court's judgment for that of the administrator as to what a plan "requires." Such a restricted test has been rejected by other Courts of Appeals. Thus, in a recent ERISA severance benefits case, the Eleventh Circuit noted that the issue under the arbitrary and capricious test was solely whether the " 'interpretation was made rationally and in good faith—not whether it was right' " (*Anderson v. Ciba-Geigy Corp.* (11 Cir. 1985) 759 F.2d 1518, 1522).[9]

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[9] This is in accord with the test applied generally to the decisions of administrators of employee benefit plans: where more than one reasonable interpretation is possible, a court may not substitute its judgment for that of the trustee or administrator (e.g., *Miniard v. Lewis* (D.C.Cir. 1967) 387 F.2d 864, 865). Prior to the decision below, the Ninth Circuit appeared to agree with other federal courts on the standard of review (see *Smith v. CMTA-IAM Pension Trust* (9 Cir. 1981) 654 F.2d 650, 655). And, in a decision rendered exactly one week after the decision below, another panel of the Ninth Circuit appeared to adhere to the previously recognized test (*Jung v. FMC Corp.* (9 Cir. 1985) 755 F.2d 708). Despite this apparent intra-circuit conflict, en banc rehearing was denied.

The decision to deny severance benefits in the instant case was rational and based upon a reasonable interpretation of the plan. The plan's purpose is to provide allowances for employees *"whose positions are eliminated* as a result of * * * elimination of *operations* to which they have been assigned" (ER 238). Plainly, when a portion of a business is sold intact as a unit, the *operations* of that business continue and it is entirely reasonable to conclude that the employment *position* continues, albeit with a new employer.[10] Such was the conclusion of the Seventh Circuit in *Sly v. P. R. Mallory & Co., Inc.* (7 Cir. 1983) 712 F.2d 1209, in which the severance plan—like the one in issue here—was tied to "*position* elimination" (712 F. 2d 1212) (emphasis added). The Seventh Circuit (adopting the opinion of the district court) declared:

> "While it is true that the work force of Mallory was reduced and positions eliminated within Mallory due to the sale * * *, in fact the work force remained intact and the positions remained available to the employees" (712 F.2d 1211).

Thus, under the terms of the plan here in issue, an employer-administrator in the Seventh Circuit may reasonably conclude that no severance benefits should be paid when employment continues with a new employer; an employer-administrator in the Ninth Circuit may not.[11]

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[10] The Ninth Circuit sought to bolster its decision by referring to supposed admissions of "disparate" treatment of executives and salaried employees (Appx. C, p. A33). But, on their face, the statements in question dealt with executives who lost their *employment positions* (see id.). If an executive *or any other employee* lost his or her employment position as the result of a sale, merger, or otherwise, severance benefits would be paid. There is *no* evidence of "disparate" treatment.

[11] The Ninth Circuit's decision was based in part upon its restricted view of the arbitrary and capricious test and in part upon its erroneous statement of the terms of the Del Monte plan. Although its opinion is not entirely clear, the Ninth Circuit characterized the Del Monte plan as being dependent upon "*job* elimination," reasoning that plaintiffs' "jobs" *with Del Monte* were eliminated as a matter of law (Appx. C, pp. A30-

The Ninth Circuit dismissed the uncontradicted evidence of Del Monte's consistent past practice of denying severance benefits in similar cases on the ground that it was "secret" (Appx. C, pp. A31-A32).[12] However, every other case on point correctly—and sensibly—holds that such consistent past practice is relevant because: "Evenhandedness of treatment is evidence of good faith" (*Anderson v. Ciba-Geigy Corp.* (11 Cir. 1985) 759 F.2d 1522; accord: *Sly v. P. R. Mallory & Co., Inc.* (7 Cir. 1983) 712 F.2d 1209, 1213; *Paris v. Profit Sharing Plan* (5 Cir. 1981) 637 F.2d 357, 362). The supposed "secret" nature of the past practice is plainly irrelevant to the question of employer good faith— which question focuses on the evenhandedness of the employer's action, not employee knowledge of it.[13]

A31). The Ninth Circuit's interpretation is simply wrong; the plan refers to elimination of *employment positions* generally, not "jobs" with Del Monte. For the same reason, the Ninth Circuit attempted distinction of the Seventh Circuit's opinion in *Sly*—on the ground that the *Sly* plan was based upon "unemployment" (see Appx. C, pp. A29-A30, fn.2)—is also wrong. That plan made no reference to unemployment but rather, as here, to "position elimination" (712 F.2d 1212).

[12] There is no basis to the Ninth Circuit's suggestion that Del Monte's interpretation was the result of "hindsight" (Appx. C, p. A32). The uncontroverted evidence showed consistent application throughout the years (ER 189, 236).

[13] Moreover, the uncontroverted evidence here showed that plaintiffs were aware that subsidiaries were sold as going concerns, and that they knew of no employee—whose employment continued—who had received severance pay benefits in such cases (ER 136, 229, 448, 469, 610-611).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted

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Appendix A

United States District Court
Northern District of California
No. C-82-6911-WHO

Barbara Blau, Ram Blau, Ann Mayo
and Richard Lindgren, Individually
and on Behalf of all Other Former
Employees of Del Monte Snacks,
Inc., Similarly Situated,
Plaintiffs,

vs.

Del Monte Corporation, A New York Corporation;
R. J. Reynolds Industries, Inc., a Delaware Corporation;
Del Monte Snacks, Inc., A California Corporation;
and Does I Through XXX, Inclusive,
Defendants.

Partial Transcript of Proceedings
Before the Honorable William H. Orrick, Judge

The Court: The matter is submitted, and I'm going to rule.

The motion for summary judgment is granted. I have reviewed the file, I've reviewed the declarations, I have given every balance—balance of facts to the favor of the plaintiff but I think it's clear that this is—the plan that the Del Monte Company had was clear on its face that in a situation like this, where the nonsalaried employees retained the same jobs they had with Del Monte, were doing the same things for a company that had a similar plan, that the Del Monte plan didn't apply. That the Del Monte plan was directed to employees who were thrown out on the street.

I did read the Sly against Mallory case, the Seventh Circuit case, which I find is . . . very similar to this case. That was an employee welfare benefit plan under ERISA.

And I don't agree with the contention that the dispute about the meaning of a plan is a factual dispute. It seems to me that it's

clearly a legal issue which can be determined on summary judgment.

Now, the issues of fact that the plaintiff claims are, first, that the plan is not intended to compensate for periods of unemployment, but that it's compensation for past services. And that is a good argument.

I find, however, as I indicated, that I'm persuaded by the case in the Seventh Circuit.

Then the plaintiffs contend that a material issue of fact remains as to the defendants' conduct in granting those severance benefits, and whether or not their conduct entitled . . . the plaintiffs to the benefits which they claim here. And they cite the Petrella case, which we discussed in the course of the argument.

But I'm persuaded by the fact that in reading the declaration of Mr. Westphal, who was the director of employee relations, and who was on the committee that drafted the plan, that—and I quote from it—Del Monte has at no time applied its separation allowance plan to pay benefits to non-union salary employees of a division or subsidiary which Del Monte sold as an ongoing concern, where those employees were offered employment by the purchaser.

And it appears from the record that all the plaintiffs have testified that they knew of no instance prior to December, 1980, where a person had received severance benefits in connection with the sale of his or her business as an ongoing concern.

Again, there's no issue of fact, because the plaintiffs didn't, and . . . no doubt because they couldn't—because they have excellent counsel—offer any evidence that the defendants' conduct created an entitlement in them.

The third issue of fact is whether Del Monte has inconsistently applied its severance policy. And that raises . . . . raised the question of the severance of Mr. Zones, who was—it was pointed out did . . . receive something from Del Monte after the date of this case, and it was in connection with the sale of another subsidiary, the Perkie Pies.

Finally, the plaintiffs suggest that the fact that Del Monte promised to reimburse the new owner for any "cestina," as they call it, or severance pay that the new owner might be compelled by Puerto Rican law to pay within two years of the purchase, shows an inconsistency in applying the plan.

No such payments were ever made. That agreement was made four years before the scope of ERISA's preemption made it clear—cleared up in the Supreme Court case of Alessi against Raybestos.

I agree that the standard of review here is arbitrary and capricious. I agree with the reasoning of the Seventh Circuit.

And . . . on the merits I find that from the evidence that's here, uncontroverted, that the substantive question as to whether or not the defendants' decision to deny the plaintiffs severance pay was not arbitrary or capricious, but was fully within the scope of the plan. And I would point out that Granny Goose still has the severance plan which we discussed during the argument.

So you prepare the order, Mr. Rotman.

Mr. Rotman: Thank you very much, Your Honor.

Mr. Vlahos: Your Honor, there are two housekeeping items.

There is also a motion pending, which has now been rendered somewhat moot, for the extension of the discovery period. I take it that is taken off calendar—

The Court: Yes. The case is dismissed.

And I know some very interested people over at Seventh and Mission. And you can . . . . They're wiser than I am, Mr. Vlahos.

Mr. Vlahos: You put me in an impossible situation. How do I respond to that, Your Honor.

(Laughter.)

The Court: All right.

Mr. Rotman: Thank you, Your Honor.

(Whereupon these proceedings were concluded.)

Appendix B

United States Court of Appeals
For the Ninth Circuit
No. 83-2622
DC CV 82-6911 WHO
Barbara Blau, Ram Blau, Ann Mayo,
and Richard Lindgren, individually
and on behalf of all other former employees
of Del Monte Snacks, Inc.,
similarly situated,
Plaintiffs-Appellants,
v.
Del Monte Corporation, etc.,
R. J. Reynolds Industries, Inc., etc.,
Del Monte Snacks, Inc., etc.,
Defendants-Appellees.

OPINION
[Filed Dec. 24, 1983]
Appeal from the United States District Court
for the Northern District of California
William H. Orrick, District Judge, Presiding
Argued and Submitted October 3, 1984

Before: Duniway, Ferguson and Nelson, Circuit Judges

Ferguson, Circuit Judge:

Plaintiffs, nonunion salaried employees of Granny Goose Foods, Inc. ("Granny Goose"), appeal the district court's grant of summary judgment in favor of Del Monte Corporation and others ("Del Monte"), in an action seeking benefits under an employee welfare plan when the employer's business is sold as an ongoing concern, where the employer has pervasively violated the mandates of the Employee Retirement Income Security Act of 1974 ("ERISA"). We conclude that the district court erred in holding that Del Monte's denial of severance benefits to plaintiffs was not arbitrary and capricious, and thus incorrectly granted defendants summary judgment.

I. Factual and Procedural Background

In 1966, Del Monte purchased Granny Goose, which became a wholly owned subsidiary of Del Monte. Employees of Granny Goose were eligible for coverage under various pension and benefit plans of Del Monte, including Del Monte's written—but confidential—"Separation Allowance Policy." This policy was in effect at the time Granny Goose was sold as an ongoing business and is the subject of this action. The policy reads as follows:

CONFIDENTIAL (DISTRIBUTION *ONLY* TO CORPORATE OFFICERS AND CORPORATE EMPLOYEE RELATIONS STAFF MANAGERS)

SEPARATION ALLOWANCE POLICY

Objective

This policy is established to provide a flexible and general guide for management in determining appropriate separation allowances for employees whose positions are eliminated as a result of reorganization, consolidation, or elimination of operations to which they have been assigned and for whom appropriate alternative employment opportunities are unavailable within the Corporation.

Eligibility

Subject to the limitations outlined herein, separation allowances may be payable to any terminated full-time regular employee. Employees subject to Union-negotiated termination allowance programs are not eligible.

Separation allowances are *not* payable

—to employees who have been discharged for cause.

—to employees who have refused transfer to suitable positions of approximately equal pay offered to them by the Corporation.

Amounts of Separation Allowances

The schedule attached represents an acceptable standard which has been usefully applied in the past. In the case of previous, simultaneous multiple terminations, it has customarily been offered on a uniform basis to all affected employees regardless of benefits available to them from other Corporation plans such as the Retirement and Savings-Investment Plans. However, all circumstances pertaining to each case, including any retirement and Social Security benefits available should be taken into account in determining the amount of separation allownace, if any.

Depending upon management's judgment of the merits of each case and the individual circumstances of the employee involved, the suggested amounts may be decreased, or increased up to 25%, on the recommendation of the appropriate organization head with executive approval as indicated in the succeeding paragaraph.

Authorities for Approval

On recommendation of the appropriate organization head with the concurrence of the corporate Employee Relations Department, individual separation allowances up to 125% of the schedule may be approved by the Chairman of the Board, President, Executive Vice President, or the Group Vice President to whom the organization unit affected reports.

Allowances in excess of 125% of the schedule may be approved upon recommendation of the appropriate Group Vice President with the concurrence of the Chairman of the Board or President, and the Vice President, Employee Relations.

Payment

At the option of the Corporation, separation allowances may be paid in a single sum or in installments.

Extended Health Benefits

Employees terminated under this program may continue their coverage under the lay-off provisions of the Group Health Plan for regular employees. (Regular rate schedule for 3 months plus employee pay-all rate schedule for up to 8 additional months.) Thereafter, they may convert to individual coverage as offered by The Equitable.

Employees who are eligible for retirement and are considered retired by the Corporation may convert to a retired status under the Retired Group Health Plan at any time following termination but before the conclusion of the 11-month period above.

(Schedule not reprinted.)

Plaintiffs, a class of former nonunion salaried employees of Granny Goose, did not obtain a copy of this written separation policy until after this action was filed. Del Monte neither published the policy nor informed plaintiffs of its existence, contents or terms. Only corporate officers and corporate employee relations staff managers had access to the document.

In 1975, several years before the Separation Allowance Policy was revised to its present form, Del Monte decided either to close or sell Granny Goose. In June 1980, Del Monte announced it was actively seeking to sell Granny Goose as an ongoing concern. A group of private investors purchased the business effective December 13, 1980.

With the exception of four employees who were transferred to the Del Monte payroll, all salaried, nonunion employees of Granny Goose as of December 12, 1980 commenced working for Granny Goose (under its new ownership) on December 13, 1980 with similar responsibilities and similar rates of pay, but somewhat different benefits.

On October 14, 1982, plaintiffs demanded their rights to severance benefits from Del Monte. Del Monte never responded, and on November 18, 1982, plaintiffs filed this action in state court. Their complaint consisted of seven causes of action, one of

which arose under a federal theory of liability, ERISA. 29 U.S.C. § 1132(e)(1).

Defendants removed the action to federal district court pursuant to 28 U.S.C. § 1441 and answsered the complaint. Thereafter, defendants moved for partial summary judgment on plaintiffs' first, second, third, fourth, fifth and seventh causes of action, alleging that ERISA preempted these state law claims. The district court dismissed those causes of action.

Plaintiffs then filed a demand for jury trial on March 1, 1983. The district court granted defendants' motion to strike the demand as untimely on May 18, 1983, and granted defendants' motion for summary judgment on December 1, 1983. This appeal followed.

II. This Action Arises Under ERISA

The Employee Retirement Income Security Act of 1974 (ERISA) is a comprehensive remedial statute designed to protect working men and women and to cure widespread weaknesses in the private pension system. To strengthen the pension system, ERISA established minimum vesting, funding, fiduciary and disclosure requirements which every pension plan must meet. It also delineated a specific uniform standard of conduct for fiduciaries. *See generally* H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639.

ERISA applies to any "employee benefit plan" if it is established or maintained by any employer or employee organization engaged in commerce or in any industry or activity affecting commerce. 29 U.S.C. § 1003(a). An "employee welfare benefit plan" is broadly defined to include:

> [A]ny plan, fund, or program which was . . . established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . unemployment, or vacation benefits, . . . or (B) any benefit described in section 186(c) of this title (other than pensions

on retirement or death, and insurance to provide such pensions).

29 U.S.C. § 1002(1). Section 186(c), cited in subsection (B) above, specifically lists "severance benefits." The effect of citing to section 186(c) is "to include within the definition of 'welfare plan' those plans which provide holiday and severance benefits, and benefits which are similar. . . ." 29 C.F.R. § 2510.3-1(a)(3). *See Donovan v. Dillingham,* 688 F.2d 1367, 1370-73 (11th Cir. 1982) (en banc). Thus, the severance pay plan in this case is an employee welfare benefit plan to which ERISA applies.

Neither the vesting and participation requirements nor the funding requirements of ERISA apply to employee welfare benefit plans such as severance plans, 29 U.S.C. §§ 1051(1), 1081(a)(1), but the reporting and disclosure requirements, 29 U.S.C. §§ 1021-1031, and the fiduciary responsibility standards, 29 U.S.C. §§ 1101-1114, do. Thus, Del Monte's severance pay plan is subject to ERISA's reporting, disclosure, and fiduciary requirements. Once established, ERISA operates to protect an employee's interest in the welfare benefit program regardless of whether the employer complies with the administrative and reporting requirements detailed under ERISA. *Donovan v. Dillingham,* 688 F.2d 1367, 1372 (11th Cir. 1982). *Accord, Dependahl v. Falstaff Brewing Corp.,* 491 F. Supp. 1188, 1195 (E.D. Mo. 1980), *aff'd* 653 F.2d 1208 (8th Cir.), *cert. denied,* 454 U.S. 968 (1981).

III. The Decision to Deny Benefits

A. Standard of Review

"Summary judgment is appropriate if, viewing the evidence in the light most favorable to the opposing party, the trial court finds 'that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.' Fed. R. Civ. P. 56(c)." *Lojek v. Thomas,* 716 F.2d 675, 677 (9th Cir. 1983). The court of appeals reviews de novo a district court's grant of summary judgment. *Id.*

In this case, this court, like the trial court, reviews another decisionmaker: the welfare benefit plan administrator. Del Monte, although it assumed the posture of an administrator in accordance with 29 U.S.C. § 1002(16)(A)(ii), made no attempt to comply with any of the duties that ERISA places upon a benefit plan administrator. To the contrary, the Severance Allowance Policy was actively concealed in violation of ERISA's reporting and disclosure requirements. *See* 29 U.S.C. § 1021(a) (disclosure to all plan participants); 29 U.S.C. § 1021(b) (various reporting requirements). Nor has Del Monte created any of the procedural mechanisms for benefit determinations that ERISA mandates. *E.g.*, 29 U.S.C § 1133 (requiring compliance with claims procedures under Department of Labor regulations).

Despite its failure to assume any of ERISA's obligations, Del Monte urges upon us the deferential standard of review generally applicable to administrator's decisions under ERISA: "decisions by the trustees of an employee benefit plan will not be reversed by the courts unless they are arbitrary, capricious, made in bad faith, not supported by substantial evidence, or erroneous on a question of law." *Malhiot v. Southern California Retail Clerks Union*, 753 F.2d 1133, 1135 (9th Cir. 1984). While not deciding that this is the only applicable standard of review when ERISA's provisions have been flouted in such a wholesale and flagrant manner, we do decide that the trustee's decision in this case fails when judged by even this deferential standard.

B. The Decision to Deny Severance Benefits to the Employees Fails under any Applicable Standard of Review

The administrator of an employee welfare benefit plan, such as this severance benefit policy, has no discretion to secrete the plan, to flout the reporting, disclosure and fiduciary obligations imposed by ERISA, or to deny benefits in contravention of the plan's plain terms. 29 U.S.C. §§ 1101-1114 (fiduciary responsibilities with respect to plan); 29 U.S.C. §§ 1021-1031 (reporting and disclosure provisions); 29 U.S.C. § 1104(a)(1)(D) (plan must be administered "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are

consistent with the provisions of [ERISA]"). Del Monte's decision to deny benefits in this case was part and parcel of its flagrant violation of ERISA's reporting, disclosure and fiduciary standards. Its denial also contradicted the provision of benefits for which the plan's plain terms—stripped of any secret analysis of the plan's secreted terms—provide. Thus, the defendants' decision was, at best, arbitrary and capricious.

The undisputed facts show that defendants failed to comply with virtually every applicable mandate of ERISA. The Separation Allowance Policy was "confidential," i.e., secret, in contravention of ERISA's reporting and disclosure provisions. 29 U.S.C. §§ 1021-1031. The policy was subject to no claims procedure. ERISA mandates a reasonable claims procedure, 29 U.S.C. § 1133; the Code of Federal Regulations establishes exactly what will be considered reasonable:

> (1) A claims procedure will be deemed to be *reasonable only* if it:
>
> (i) Complies with the provisions of . . . this section . . . .
>
> (ii) Is described in the summary plan description . . . ,
>
> (iii) Does not contain any provision, and is not administered in a way, which unduly inhibits or hampers the initiation and processing of plan claims, and
>
> (iv) Provides for informing participants in writing, in a timely fashion, of the time limits . . . .

29 C.F.R. § 2560.503-1(b)(1) (emphasis supplied). Here, there was no summary plan description, no claims procedure, and no provision to inform participants in writing of anything. Del Monte's claims procedure fails simply because there was none. *Id.* Similarly, Del Monte's administration was arbitrary and capricious because it failed to conform to ERISA's reporting and disclosure requirements.

While it is thus clear that violations of ERISA's procedural requirements—reporting, disclosure and claims procedures—amount to arbitrary and capricious conduct, the remedy to which this entitles the victimized employees has often been less

than satisfactory. Ordinarily, a claimant who suffers because of a fiduciary's failure to comply with ERISA's procedural requirements is entitled to no substantive remedy. *Wolfe v. J.C. Penney Co.*, 710 F.2d 388, 393 (7th Cir. 1983). We do not deny the logic of this proposition in the ordinary case. ERISA mandates no minimum substantive content for employee welfare benefit plans, and therefore a court has no authority to draft the substantive content of such plans.

Under ERISA, however, no great wall divides procedural from substantive violations. Although reporting and disclosure requirements are arguably procedural, it is these procedural requirements that alter the very balance of knowledge and rights between covered employees and their employer. The importance of disclosure applies to welfare benefit plans as well as to pensions:

> Disclosure has been seen as a device to impart to employees sufficient information and data to enable them to know whether the plan was . . . being administered as intended. It was expected that the information disclosed would enable employees *to police* their plans.

H.R. Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4649 (emphasis supplied).

When procedural violations rise to the level that they have in this case, they alter the substantive relationship between employer and employee that disclosure, reporting and fiduciary duties sought to balance somewhat more equally. The quality of defendants' procedural violations thus work a substantive harm. We therefore consider the continuing arbitrary and capricious procedural violations in determining whether the decision to deny benefits in a particular case was also arbitrary and capricious. We hold that the continued arbitrary and capricious administration practiced by Del Monte is highly probative of whether a particular decision to deny benefits was infected by its having been made in conformity with the objectionable scheme. *Cf. Dennard v. Richards Group, Inc.*, 681 F.2d 306, 314 (5th Cir. 1982) (listing various other factors that may be taken into consideration in determining whether the decision of a pension plan administrator

met the arbitrary and capricious standard). In this case, of course, this factor weighs heavily against Del Monte.[1]

Other factors also weigh against Del Monte's denial of benefits in this case. With employee welfare benefit plans, as with pension plans that are subject to the full panoply of ERISA requirements, imposition of a standard that is not contained in the terms of a plan amounts to an arbitrary and capricious decision. *See Morgan v. Mullins*, 643 F.2d 1320, 1321 (8th Cir. 1981) ("Where the Trustees impose a standard not required by the pension plan itself, this court has stated that such action 'would result in an unwarranted and arbitrary construction of the Plan.' ") (quoting *Maness v. Williams*, 513 F.2d 1264, 1267 (8th Cir. 1975)).

Del Monte imposed several standards not required by the severance policy. The plan provides for severance pay when jobs are "*eliminated*" and "alternative *employment opportunities are unavailable within the Corporation*"[2] (emphasis supplied). The

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[1] The court in *Sly v. Mallory & Co.*, 712 F.2d 1209 (7th Cir. 1983), upon which defendants place heavy reliance, had no occasion to determine whether that plan was infected with arbitrary and capricious administration. Although the *Sly* plan, like Del Monte's plan, was kept confidential from the participants, the appellate court accepted the district court's determination that "the employee benefit plan was administered in a rational and reasonable manner, in good faith, within the discretion of the administrators and in accordance with the plain wording of the documents and instruments governing the plan." *Id.* at 1211. Del Monte's plan, in contrast, was administered in an inherently unreasonable manner.

[2] In *Sly*, the plan, "read as a whole," conditioned the availability of severance benefits upon the employee's subsequent and continued unemployment. *Sly*, 712 F.2d at 1211. Del Monte's plan says nothing of unemployment. In fact, the policy in this case exempts only three classes of people, of which plaintiffs comprise no part: employees subject to union-negotiated termination allowance programs; employees who have been discharged for cause; and employees who have refused transfer to suitable positions of approximately equal pay offered to them by "the Corporation." The employer's denial of benefits in *Sly*, which was

plan does not condition receipt of severance benefits upon elimination of positions from the face of the earth, but from "the Corporation." The plan does not condition receipt of benefits upon employees' subsequent unemployment, but upon job "eliminat[ion]." The plan does not condition receipt of benefits upon failure of a successor corporation to offer employees jobs after their employment with Del Monte ceases, but upon job "eliminat[ion]."

The plan specifies only that the job be "eliminated" from the Corporation. No permissible construction of "eliminated" permits us to imply other conditions into the plan, as Del Monte would have us do. Neither the case law nor Del Monte's past practice allows such bootstrapping.

Certainly, under the applicable case law we cannot deny that jobs are eliminated—and then, perhaps, reinstated—when one employer succeeds another. Even under a collective bargaining agreement, where the National Labor Relations Act imposes various duties on a successor employer, "a business entity which replaces another is not obligated to hire all or any of its predecessor's employees." *Bates v. Pacific Maritime Association,* 744 F.2d 705, 708 (9th Cir. 1984) (citations omitted) (applying this rule to a successorship issue arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C, §§ 2000e—2000e-17 and 42 U.S.C. § 1981).[3] Lack of obligation to rehire, and the consequence of the

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neither arbitrary nor capricious, thus differs from Del Monte's because the two plans differ.

The plan in this case also differs from the plan in *Pinto v. Zenith Radio Corp.*, 480 F. Supp. 361 (N.D. Ill. 1979), where the decision to deny severance pay was not arbitrary and capricious. The *Pinto* plan, like the *Sly* plan, but unlike Del Monte's plan, conditioned receipt of severance benefits upon the former.

[3] Del Monte contends that the employees' impressions of their work show only slight differences between their job tasks before and after the sale. While perhaps supported by deposition testimony, this contention is irrelevant. The employees' subjective attitude about job similarity does not bear on whether one job was eliminated and another took its place,

prior job's elimination, is no less real where, as here, the employees lack the benefits of a collective bargaining agreement with either the predecessor or successor employer.

Neither does the term "eliminated" necessarily contain any of these conditions inherent in its usage. *See, e.g., Livernois v. Warner-Lambert,* 723 F.2d 1148, 1155 (4th Cir. 1983) (ending defendant's "liability for job severance to those continuing as employees (with the successor) . . . would clearly constitute . . . job termination"); *Sly,* 712 F.2d at 1210 (even though claimants did not receive severance benefits in this case, the court acknowledged that "(a)s a result of the sale [of the business as an ongoing concern], employees of the [predecessor company] were terminated from their employment"); *Pinto,* 480 F. Supp. at 364 (claimants unentitled to benefits because of overall construction of severance plan, but court acknowledged that sale of business as an ongoing concern resulted in the loss of plaintiff's old job, and his being "immediately hired by defendants' successor company"). *See also Chapin v. Fairchild Camera & Instrument Corp.,* 31 Cal. App. 3d 192, 197-98, 107 Cal. Rptr. 111, 115 (1973) ("the sale [of a business as an ongoing concern] involved a permanent release of the Employees").

Nor can we permit resort to Del Monte's secret intentions behind its secret severance pay policy to imply these conditions into the plan. Del Monte claims that the secret purpose behind its secret severance benefit policy was to benefit only those employees who were without a job of any kind after termination. We decline to refer to the secret intent behind a secret plan to determine whether the denial of severance benefits in this case was arbitrary and capricious. To permit reference to such subterfuge would only encourage violation of ERISA's reporting and disclosure requirements, in the hope of later being able to interpret the policy through the cost-benefit analysis of hindsight. In *Donovan v. Dillingham,* 688 F.2d 1367 (11th Cir. 1982), the court stated: "it would be incongruous for persons establishing or maintaining informal or unwritten employee benefit plans, or

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because the plan conditions receipt of benefits on job elimination—not job dissimilarity.

assuming the responsibility of safeguarding plan assets, to circumvent the Act merely because an administrator or other fiduciary failed to satisfy reporting or fiduciary standards." *Id.* at 1372. Thus, that court decided that a plan did exist within the meaning of ERISA despite its informal and unwritten form. That court decided only that jurisdiction under ERISA therefore existed. We are faced with the next logical question: May the same failure to satisfy reporting or fiduciary standards circumvent the company's obligations under the written expression of the plan? We decline to reward such subterfuge by permitting reference to Del Monte's hidden intentions behind its hidden plan.

For similar reasons we decline to reward Del Monte's past practice of denying severance benefits to employees in this situation by interpreting the plan with reference to Del Monte's past course of conduct. Imposition of conditions outside the plan amounts to arbitrary and capricious conduct in spite of how often it is practiced. *See Dennard v. Richards Group, Inc.*, 681 F.2d at 318 (" 'if the interpretation is unreasonable from the beginning, such an interpretation may still be arbitrary and capricious' ") (quoting *Morgan v. Mullins*, 643 F.2d at 1324 n.4).

ERISA seeks "to safeguard the well-being and security of working men and women and to apprise them of their rights and obligations under any employee benefit plan." *Donovan v. Dillingham*, 688 F.2d at 1372. Not coincidentally, the evils against which ERISA was enacted to guard—insecurity, lack of knowledge, and inability to police plan administration—are just the evils that appear in Del Monte's administration of its plan. Del Monte's counsel revealed as much in his treatment of two hypothetical situations that could arise under its plan. First, in Defendant's Reply Memorandum in Support of Motion for Summary Judgment before the district court, Del Monte states: "Even if [a president of a divested subsidiary of Del Monte which had been sold as an ongoing concern] actually received such severance benefits, it is understandable that the president of the company would lose his job when his company was bought as an on-going [sic] concern and that he would receive severance pay." Understandable for a president, but not for a salaried nonunion

employee, based on Del Monte's secret distinctions and conditions. Second, at oral argument, Del Monte's counsel was asked, "What if an executive, the president of Del Monte, terminated his employment with Del Monte and the next day got a job working for Pillsbury. Would he be entitled to severance pay?" Counsel responded, "Probably." Thus, benefits would "probably" be available for a president or a vice president, but not for a salaried nonunion employee, based on Del Monte's secret distinctions and conditions. We decline to undermine the purposes of ERISA by considering Del Monte's secret conditions on its secret plan that result in such widely disparate results.

The result in this case would be similar if we had decided it under the remaining prongs of the test for evaluating the decision of an ERISA administrator: erroneous on a question of law, made in bad faith, or unsupported by substantial evidence. *Malhiot v. Southern California Retail Clerks Union,* 735 F.2d at 1135. A procedural error may be "a significant error on a question of law." *Wolfe v. J.C. Penney Co.,* 710 F.2d 388, 393 (7th Cir. 1983). The plethora of procedural errors in this case thus constitute significant errors on a question of law, and they may be weighed in the evaluation of the administrator's substantive decision to deny benefits—a decision implicated in the procedural morass. Similarly, the gross violations of ERISA's reporting and disclosure duties weigh in the evaluation of whether the administrator made his decisions—including the substantive decision in this case—in bad faith, or in contravention of his fiduciary duties. Finally, substantial evidence would not support this decision because the employer's secret intentions and the employees' subjective attitudes are irrelevant to whether the jobs were eliminated and the decison to deny benefits arbitrary.

IV. Preemption

Plaintiffs' complaint contained seven causes of action, one of which was based on a federal theory of liability (ERISA). The remaining causes of action were based on state common law theories of liability (breach of contract implied in fact; promisory

estoppel; estoppel by conduct; fraud and deceit; and breach of contract).

Defendants moved for partial summary judgment on plaintiffs' state law claims based on ERISA preemption. The district court granted the motion, and the order dismissing the first second, third, fourth, fifth, and seventh causes of action was entered May 18, 1983. Plaintiffs argue common law principles are applicable under ERISA as a matter of federal law, and the court may therefore incorporate state common law causes of action into that common law to further ERISA's policies.

The district court was correct in finding that ERISA preempted plaintiffs' state common law causes of action. We recognize that "the preemptive effect of ERISA is broad, [but] it is not all-encompassing." *Lane v. Goren,* 743 F.2d 1337, 1339 (9th Cir. 1984). ERISA is, however, broad enough to preempt the causes of action upon which plaintiffs sought to rely. *See Lafferty v. Solar Turbines International,* 666 F.2d 408 (9th Cir. 1982) (common law breach of contract cause of action preempted by ERISA); *Dependahl v. Falstaff Brewing Corp.,* 653 F.2d 1208, 1215-16 (8th Cir.), *cert. denied,* 454 U.S. 968 (1981) (Congress had preempted state common law claims of tortious interference with employee benefit plans).

v. Demand for Jury Trial

The trial judge's decision to strike plaintiffs' demand for jury trial will be reversed upon a showing of abuse of discretion. *Las Vegas Sun, Inc. v. Summa Corp.,* 610 F.2d 614, 621 (9th Cir. 1979), *cert. denied,* 447 U.S. 906 (1980). Since plaintiffs did not request a jury trial before this case was removed from state court, Fed. R. Civ. P. 38(b), made applicable by Rule 81(c), required plaintiffs to demand a jury trial within ten days from the filing of the last pleading concerned with the issues for which trial by jury is sought. The last pleading was Del Monte's answer, filed December 23, 1982. Plaintiffs filed a demand for a jury trial on March 1, 1983, almost two months late. Failure to file within the time provided constitutes a waiver of the right to trial by jury. Fed. R. Civ. P. 38(d).

Plaintiffs argue the district court abused its discretion in failing to grant relief from their unintentional waiver. The district court in its discretion may order a jury trial on a motion by a party who has not filed a timely demand for one. Fed. R. Civ. P. 39(b). That discretion is narrow, however, and does not permit a court to grant relief when the failure to make a timely demand results from an oversight or inadvertence. *Lewis v. Time, Inc.*, 710 F.2d 549, 556-57 (9th Cir. 1983). *See Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 675 (9th Cir. 1975) (the district court's discretion "should rarely be exercised to grant a trial by jury in default of a proper request for it"). Plaintiffs allege no reason for their failure to file a timely demand for jury trial. Nor is there an independent constitutional or statutory right to jury trial in ERISA actions. *In re Vorpahl*, 695 F.2d 318 (8th Cir. 1982); *Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980); *Wardle v. Central States*, 627 F.2d 820, 828-30 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981). Thus, the district court did not abuse its discretion in striking plaintiffs' untimely demand for jury trial.

CONCLUSION

Due to the serious violations of ERISA by Del Monte, we find that its general administration of the Severance Allowance Policy and its particular decision to deny severance benefits to plaintiffs under its interpretation of that policy were arbitrary and capricious. Under any standard of review, Del Monte's failure to provide severance benefits to these plaintiffs must fail.

The district court erred in finding that Del Monte's decision to deny severance benefits to plaintiffs was not arbitrary and capricious. Its grant of summary judgment is REVERSED and this cause is REMANDED to the district court for further proceedings upon plaintiffs' complaint.

Appendix C

United States Court of Appeals

For the Ninth Circuit

No. 83-2622
DC CV 82-6911 WHO

AMENDED OPINION

Barbara Blau, Ram Blau, Ann Mayo,
and Richard Lindgren, individually
and on behalf of all other former
employees of Del Monte Snacks, Inc.,
similarly situated,
Plaintiffs-Appellants,

vs.

Del Monte Corporation, etc.
R.J. Reynolds Industries, Inc., etc.,
Del Monte Snacks, Inc., etc.,
Dedendants-Appellees.

[Filed March 5, 1985]

Appeal from the United States District Court
for the Northern District of California
William H. Orrick, District Judge, Presiding

Argued and Submitted October 3, 1984
Decided December 5, 1984

Before: Duniway, Ferguson and Nelson, Circuit Judges

FERGUSON, Circuit Judge:

Plaintiffs, nonunion salaried employees of Granny Goose Foods, Inc. ("Granny Goose"), appeal the district court's grant of summary judgment in favor of Del Monte Corporation and others ("Del Monte"), in an action seeking benefits under an employee welfare plan when the employer's business is sold as an ongoing concern, where the employer has pervasively violated the mandates of the Employee Retirement Income Security Act of 1974

("ERISA"). We conclude that the district court erred in holding that Del Monte's denial of severance benefits to plaintiffs was not arbitrary and capricious, and thus incorrectly granted defendants summary judgment. Plaintiffs did not move for summary judgment, so we need not decide whether Del Monte's denial of benefits was arbitrary and capricious as a matter of law.

I. Factual and Procedural Background

In 1966, Del Monte purchased Granny Goose, which became a wholly owned subsidiary of Del Monte. Employees of Granny Goose were eligible for coverage under various pension and benefit plans of Del Monte, including Del Monte's written—but confidential—"Separation Allowance Policy." This policy was in effect at the time Granny Goose was sold as an ongoing business and is the subject of this action. The policy reads as follows:

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SEPARATION ALLOWANCE POLICY

Objective

This policy is established to provide a flexible and general guide for management in determining appropriate separation allowances for employees whose positions are eliminated as a result of reorganization, consolidation, or elimination of operations to which they have been assigned and for whom appropriate alternative employment opportunities are unavailable within the Corporation.

Eligibility

Subject to the limitations outlined herein, separation allowances may be payable to any terminated full-time regular employee. Employees subject to Union-negotiated termination allowance programs are not eligible.

Separation allowances are *not* payable—to employees who have been discharged for cause—to employees who have refused transfer to suitable positions of approximately equal pay offered to them by the Corporation.

Amounts of Separation Allowances

The schedule attached represents an acceptable standard which has been usefully applied in the past. In the case of previous, simultaneous multiple terminations, it has customarily been offered on a uniform basis to all affected employees regardless of benefits available to them from other Corporation plans such as the Retirement and Savings-Investment Plans. However, all circumstances pertaining to each case, including any retirement and Social Security benefits available should be taken into account in determining the amount of separation allowance, if any.

Depending upon management's judgment of the merits of each case and the individual circumstances of the employee involved, the suggested amounts may be decreased, or increased up to 25%, on the recommendation of the appropriate organization head with executive approval as indicated in the succeeding paragraph.

Authorities for Approval

On recommendation of the appropriate organization head with the concurrence of the corporate Employee Relations Department, individual separation allowances up to 125% of the schedule may be approved by the Chairman of the Board, President, Executive Vice President, or the Group Vice President to whom the organization unit affected reports.

Allowances in excess of 125% of the schedule may be approved upon recommendation of the appropriate Group Vice President with the concurrence of the Chairman of the Board or President, and the Vice President, Employee Relations.

Payment

At the option of the Corporation, separation allowances may be paid in a single sum or in installments.

Extended Health Benefits

Employees terminated under this program may continue their coverage under the lay-off provisions of the Group Health Plan for regular employees. (Regular rate schedule for 3 months plus employee pay-all rate schedule for up to 8 additional months.) Thereafter, they may convert to individual coverage as offered by The Equitable.

Employees who are eligible for retirement and are considered retired by the Corporation may convert to a retired status under the Retired Group Health Plan at any time following termination but before the conclusion of the 11-month period above.

(Schedule not reprinted.)

Plaintiffs, a class of former nonunion salaried employees of Granny Goose, did not obtain a copy of this written separation policy until after this action was filed. Del Monte neither published the policy nor informed plaintiffs of its existence, contents or terms. Only corporate officers and corporate employee relations staff managers had access to the document.

In 1975, several years before the Separation Allowance Policy was revised to its present form, Del Monte decided either to close or sell Granny Goose. In June 1980, Del Monte announced it was actively seeking to sell Granny Goose as an ongoing concern. A group of private investors purchased the business effective December 13, 1980.

With the exception of four employees who were transferred to the Del Monte payroll, all salaried, nonunion employees of Granny Goose as of December 12, 1980 commenced working for Granny Goose (under its new ownership) on December 13, 1980 with similar responsibilities and similar rates of pay, but somewhat different benefits.

On October 14, 1982, plaintiffs demanded their rights to severance benefits from Del Monte. Del Monte never responded, and on November 18, 1982, plaintiffs filed this action in state court. Their complaint consisted of seven causes of action, one of which arose under a federal theory of liability, ERISA. 29 U.S.C. § 1132(e)(1).

Defendants removed the action to federal district court pursuant to 28 U.S.C. § 1441 and answered the complaint. Thereafter, defendants moved for partial summary judgment on plaintiffs' first, second, third, fourth, fifth and seventh causes of action, alleging that ERISA preempted these state law claims. The district court dismissed those causes of action.

Plaintiffs then filed a demand for jury trial on March 1, 1983. The district court granted defendants' motion to strike the demand as untimely on May 18, 1983, and granted defendants' motion for summary judgment on December 1, 1983. This appeal followed.

II. This Action Arises Under ERISA

The Employee Retirement Income Security Act of 1974 (ERISA) is a comprehensive remedial statute designed to protect working men and women and to cure widespread weaknesses in the private pension system. To strenghen the pension system, ERISA established minimum vesting, funding, fiduciary and disclosure requirements which every pension plan must meet. It also delineated a specific uniform standard of conduct for fiduciaries. *See generally* H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639.

ERISA applies to any "employee benefit plan" if it is established or maintained by any employer or employee organization engaged in commerce or in any industry or activity affecting commerce. 29 U.S.C. §1003 (a). An "employee welfare plan" is broadly defined to include:

> [A]ny plan, fund, or program which was . . . established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the

> purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . unemployment, or vacation benefits, . . . or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C.§ 1002(1). Section 186(c), cited in subsection (B) above, specifically lists "severance benefits." The effect of citing to section 186(c) is "to include within the definition of 'welfare plan' those plans which provide holiday and severance benefits, and benefits which are similar . . . ." 29 C.F.R. § 2510.3-1(a)(3). *See Donovan v. Dillingham*, 688 F.2d 1367, 1370-73 (11th Cir. 1982) (en banc). Thus, the severance pay plan in this case is an employee welfare benefit plan to which ERISA applies.

Neither the vesting and participation requirements nor the funding requirements of ERISA apply to employee welfare benefit plans such as severance plans, 29 U.S.C. §§ 1051(1), 1081(a)(1), but the reporting and disclosure requirements, 29 U.S.C. §§ 1021-1031, and the fiduciary responsibility standards, 29 U.S.C. §§ 1101-1114, do. Thus, Del Monte's severance pay plan is subject to ERISA's reporting, disclosure, and fiduciary requirements. Once established, ERISA operates to protect an employee's interest in the welfare benefit program regardless of whether the employer complies with the administrative and reporting requirements detailed under ERISA. *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982). *Accord, Dependahl v. Falstaff Brewing Corp.*, 491 F. Supp. 1188, 1195 (E.D. Mo. 1980), *aff'd* 653 F.2d 1208 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981).

III. The Decision to Deny Benefits

A. Standard of Review

"Summary judgment is appropriate if, viewing the evidence in the light most favorable to the opposing party, the trial court finds 'that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.' Fed. R. Civ. P.

56(c)." *Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir. 1983). The court of appeals reviews de novo a district court's grant of summary judgment. *Id.*

In this case, this court, like the trial court, reviews another decisionmaker: the welfare benefit plan administrator. Del Monte, although it assumed the posture of an administrator in accordance with 29 U.S.C. § 1002(16) (A) (ii), made no attempt to comply with any of the duties that ERISA places upon a benefit plan administrator. To the contrary, the Severance Allowance Policy was actively concealed in violation of ERISA's reporting and disclosure requirements. *See* 29 U.S.C. § 1021(a) (disclosure to all plan participants); 29 U.S.C. § 1021(b) (various reporting requirements). Nor has Del Monte created any of the procedural mechanisms for benefit determinations that ERISA mandates. *E.g.*, 29 U.S.C. § 1133 (requiring compliance with claims procedures under Department of Labor regulations).

Despite its failure to assume any of ERISA's obligations, Del Monte urges upon us the deferential standard of review generally applicable to administrator's decisions under ERISA: "decisions by the trustees of an employee benefit plan will not be reversed by the courts unless they are arbitrary, capricious, made in bad faith, not supported by substantial evidence, or erroneous on a question of law." *Malhiot v. Southern California Retail Clerks Union*, 735 F.2d 1133, 1135 (9th Cir. 1984). We do not decide that this is the only applicable standard of review when ERISA's provisions have been flouted in such a wholesale and flagrant manner. We do, however, decide that the district court erred by holding, as a matter of law, that Del Monte's decision survived even this deferential standard.

B. The Decision to Deny Severance Benefits to the Employees Could Not be Said as a Matter of Law Not to be Arbitrary and Capricious

The administrator of an employee welfare benefit plan, such as this severance benefit policy, has no discretion to secrete the plan, to flout the reporting, disclosure and fiduciary obligations imposed by ERISA, or to deny benefits in contravention of the plan's plain

terms. 29 U.S.C. §§ 1101-1114 (fiduciary responsibilities with respect to plan); 29 U.S.C. §§ 1021-1031 (reporting and disclosure provisions); 29 U.S.C. § 1104(a)(1)(D) (plan must be administered "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]"). It is undisputed that the administration of this plan failed to comply with these reporting, disclosure and fiduciary requirements. Del Monte's decision to deny benefits in this case was made in the course of, and could have been infected by, these ERISA violations. Thus, the defendants' decision could not be said, as a matter of law, not to be arbitrary and capricious, and summary judgment was inappropriately granted to Del Monte at this stage of the proceedings.

The undisputed facts show that defendants failed to comply with virtually every applicable mandate of ERISA. The Separation Allowance Policy was "confidential," i.e., secret, in contravention of ERISA's reporting and disclosure provisions. 29 U.S.C. §§ 1021-1031. The policy was subject to no claims procedure. ERISA mandates a reasonable claims procedure, 29 U.S.C. § 1133; the Code of Federal Regulations establishes exactly what will be considered reasonable:

> (1) A claims procedure will be deemed to be *reasonable only* if it:
>
> (i) Complies with the provisions of . . . this section . . . .
>
> (ii) Is described in the summary plan description . . . ,
>
> (iii) Does not contain any provision, and is not administered in a way, which unduly inhibits or hampers the initiation and processing of plan claims, and
>
> (iv) Provides for informing participants in writing, in a timely fashion, of the time limits . . . .

29 C.F.R. § 2560.503-1(b)(1) (emphasis supplied). Here, there was no summary plan description, no claims procedure, and no provision to inform participants in writing of anything. Del Monte's claims procedure fails simply because there was none. *Id.*

Whiie it is thus clear that violations of ERISA's procedural requirements—reporting, disclosure and claims procedures—may amount to arbitrary and capricious conduct, the remedy to which this entitles the victimized employees has often been less than satisfactory. Ordinarily, a claimant who suffers because of a fiduciary's failure to comply with ERISA's procedural requirements is entitled to no substantive remedy. *Wolfe v. J.C. Penney Co.*, 710 F.2d 388, 393 (7th Cir. 1983). We do not deny the logic of this proposition in the ordinary case. ERISA mandates no minimum substantive content for employee welfare benefit plans, and therefore a court has no authority to draft the substantive content of such plans.

Under ERISA, however, no great wall divides procedural from substantive violations. Although reporting and disclosure requirements are arguably procedural, it is these procedural requirements that alter the very balance of knowledge and rights between covered employees and their employer. The importance of disclosure applies to welfare benefit plans as well as to pensions:

> Disclosure has been seen as a device to impart to employees sufficient information and data to enable them to know whether the plan was . . . being administered as intended. It was expected that the information disclosed would enable employees *to police* their plans.

H.R Rep. No. 93-533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4649 (emphasis supplied).

When procedural violations rise to the level that they have in this case, they alter the substantive relationship between employer and employee that disclosure, reporting and fiduciary duties sought to balance somewhat more equally. The quantity of defendants' procedural violations may then work a substantive harm. Thus, in reviewing an administrator's decision, a court must consider continuing procedural violations in determining whether the decision to deny benefits in a particular case was arbitrary and capricious. We hold that the type of plan administration practiced by Del Monte is highly probative of whether a particular decision

to deny benefits was infected by its having been made in comformity with the objectionable scheme. *Cf. Dennard v. Richards Group, Inc.*, 681 F.2d 306, 314 (5th Cir. 1982) (listing various other factors that may be taken into consideration in determining whether the decision of a pension plan administrator met the arbitrary and capricious standard). In this case, of course, this factor weighs heavily against Del Monte.[1]

Other factors also weigh against Del Monte's denial of benefits in this case. With employee welfare benefit plans, as with pension plans that are subject to the full panoply of ERISA requirements, imposition of a standard that is not contained in the terms of a plan amounts to an arbitrary and capricious decision. *See Morgan v. Mullins*, 643 F.2d 1320, 1321 (8th Cir. 1981) ("Where the Trustees impose a standard not required by the pension plan itself, this court has stated that such action 'would result in an unwarranted and arbitrary construction of the Plan' ") (quoting *Maness v. Williams*, 513 F.2d 1264, 1267 (8th Cir. 1975)).

Del Monte imposed several standards not required by the severance policy. The plan provides for severance pay when jobs are "*eliminated*" and "alternative *employment opportunities are unavailable within the Corporation*"[2] (emphasis supplied). The

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[1] The court in *Sly v. P.R. Mallory & Co.*, 712 F.2d 1209 (7th Cir. 1983), upon which defendants place heavy reliance, had no occasion to determine whether that plan was infected with arbitrary and capricious administration. Although the *Sly* plan, like Del Monte's plan, was kept confidential from the participants, the appellate court accepted the district court's determination that "the employee benefit plan was administered in a rational and reasonable manner, in good faith, within the discretion of the administrators and in accordance with the plain wording of the documents and instruments governing the plan." *Id.* at 1211. Del Monte's administration, in contrast, was characterized by so many ERISA violations that it is impossible to hold, as a matter of law, that the administration was not arbitrary and capricous.

[2] In *Sly*, the plan, "read as a whole," conditioned the availability of severance benefits upon the employee's subsequent and continued unemployment. *Sly*, 712 F.2d at 1211. Del Monte's plan says nothing of unemployment. In fact, the policy in this case exempts only three classes

plan does not condition receipt of severance benefits upon elimination of positions from the face of the earth, but upon job "eliminat[ion]" and unavailability of "appropriate alternative employment opportunities . . . within *the Corporation*." (Emphasis supplied). The plan does not condition receipt of benefits upon employees' subsequent unemployment, but upon job "eliminat[ion]." The plan does not condition receipt of benefits upon failure of a successor corporation to offer employees jobs after their employment with Del Monte ceases, but upon job "eliminat[ion]."

The plan specifies only that the job be "eliminated" and that alternative Corporation jobs be unavailable. No permissible construction of "eliminated" permits us to imply other conditions into the plan, as Del Monte would have us do. Neither the case law nor Del Monte's past practice allows such bootstrapping.

Certainly, under the applicable case law we cannot deny that jobs are eliminated—and then, perhaps, reinstated—when one employer succeeds another. Even under a collective bargaining agreement, where the National Labor Relations Act imposes various duties on a successor employer, "a business entity which replaces another is not obligated to hire all or any of its predecessor's employees." *Bates v. Pacific Maritime Association*, 744 F.2d 705, 708 (9th Cir. 1984) (citations omitted) (applying this rule to a successorship issue arising under Title VII of the Civil Rights

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of people, of which plaintiffs comprise no part: employees subject to union-negotiated termination allowance programs; employees who have been discharged for cause; and employees who have refused transfer to suitable positions of approximately equal pay offered to them by "the Corporation." The employer's denial of benefits in *Sly*, which was neither arbitrary nor capricious, thus differs from Del Monte's because the two plans differ.

The plan in this case also differs from the plan in *Pinto v. Zenith Radio Corp.*, 480 F. Supp. 361 (N.D. Ill. 1979), where the decision to deny severence pay was not arbitrary and capricious. The *Pinto* plan, like the *Sly* plan, but unlike Del Monte's plan, conditioned receipt of severance benefits upon the former employee's unemployment. *Id.* at 364.

Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 and 42 U.S.C. § 1981).[3] Lack of obligation to rehire, and the consequence of the prior job's elimination, is no less real where, as here, the employees lack the benefits of a collective bargaining agreement with either the predecessor or successor employer.

Neither does the term "eliminated" necessarily contain any of these conditions inherent in its usage. *See, e.g., Livernois v. Warner-Lambert,* 723 F.2d 1148, 1155 (4th Cir. 1983) (ending defendant's "liability for job severance to those continuing as employees [with the successor] . . . would clearly constitute . . . job termination"); *Sly*, 712 F.2d at 1210 (even though claimants did not receive severance benefits in this case, the court acknowledged that "[a]s a result of the sale [of the business as an ongoing concern], employees of the [predecessor company] were terminated from their employment"); *Pinto*, 480 F.Supp. at 364 (claimants unentitled to benefits because of overall construction of severance plan, but court acknowledged that sale of business as an ongoing concern resulted in the loss of plaintiff's old job, and his being "immediately hired by defendants' successor company"). *See also Chapin v. Fairchild Camera & Instrument Corp.*, 31 Cal. App. 3d 192, 197-98, 107 Cal. Rptr. 111, 115 (1973) ("the sale [of a business as an ongoing concern] involved a permanent release of the Employees").

Nor can we permit resort to Del Monte's secret intentions behind its secret severance pay policy to imply these conditions into the plan. Del Monte claims that the secret purpose behind its secret severance benefit policy was to benefit only those employees who were without a job of any kind after termination. We decline to refer to the secret intent behind a secret plan to

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[3] Del Monte contends that the employees' impressions of their work show only slight differences between their job tasks before and after the sale. While perhaps supported by deposition testimony, this contention is irrelevant. The employees' subjective attitude about job similarity does not bear on whether one job was eliminated and another took its place, because the plan conditions receipt of benefits on job elimination—not job dissimilarity.

determine whether the denial of severance benefits in this case was not arbitrary and capricious. Allowing reference to this factor would only encourage violation of ERISA's reporting and disclosure requirements, in the hope of later being able to interpret the policy through the cost-benefit analysis of hindsight. In *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982), the court stated: "it would be incongruous for persons establishing or maintaining informal or unwritten employee benefit plans, or assuming the responsibility of safeguarding plan assets, to circumvent the Act merely because an administrator or other fiduciary failed to satisfy reporting or fiduciary standards." *Id.* at 1372. Thus, that court decided that a plan did exist within the meaning of ERISA despite its informal and unwritten form. That court decided only that jurisdiction under ERISA therefore existed. We are faced with the next logical question: May the same failure to satisfy reporting or fiduciary standards go judicially unnoticed in determining the company's obligations under the written expression of the plan? Like the *Donovan* court, we answer "no."

For similar reasons we decline to reward Del Monte's past practice of denying severance benefits to employees in this situation by interpreting the plan with reference to Del Monte's past course of conduct. Imposition of conditions outside the plan amounts to arbitrary and capricious conduct in spite of how often it is practiced. *See Dennard v. Richards Group, Inc.*, 681 F.2d at 318 (" 'if the interpretation is unreasonable from the beginning, such an interpretation may still be arbitrary and capricious' ") (quoting *Morgan v. Mullins*, 643 F.2d at 1324 n.4).

ERISA seeks "to safeguard the well-being and security of working men and women and to apprise them of their rights and obligations under any employee benefit plan." *Donovan v. Dillingham*, 688 F.2d at 1372. Not coincidentally, the evils against which ERISA was enacted to guard—insecurity, lack of knowledge, and inability to police plan administration—are just the evils that appear in Del Monte's administration of its plan. Del Monte's counsel revealed as much in his treatment of two hypothetical situations that could arise under its plan. First, in

Defendant's Reply Memorandum in Support of Motion for Summary Judgment before the district court, Del Monte states: "Even if [a president of a divested subsidiary of Del Monte which had been sold as an ongoing concern] actually received such severance benefits, it is understandable that the president of the company would lose his job when his company was bought as an on-going [sic] concern and that he would receive severance pay." Understandable for a president, but not for a salaried nonunion employee, based on Del Monte's secret distinctions and conditions. Second, at oral argument, Del Monte's counsel was asked, "What if an executive, the president of Del Monte, terminated his employment with Del Monte and the next day got a job working for Pillsbury. Would he be entitled to severance pay?" Counsel responded, "Probably." Thus, benefits would "probably" be available for a president or a vice president, but not for a salaried nonunion employee, based on Del Monte's secret distinctions and conditions. We decline to undermine the purposes of ERISA by considering Del Monte's secret conditions on its secret plan that result in such widely disparate results.

IV. Preemption

Plaintiffs' complaint contained seven causes of action, one of which was based on a federal theory of liability (ERISA). The remaining causes of action were based on state common law theories of liability (breach of contract implied in fact; promissory estoppel; estoppel by conduct; fraud and deceit; and breach of contract).

Defendants moved for partial summary judgment on plaintiffs' state law claims based on ERISA preemption. The district court granted the motion, and the order dismissing the first second, third, fourth, fifth, and seventh causes of action was entered May 18, 1983. Plaintiffs argue common law principles are applicable under ERISA as a matter of federal law, and the court may therefore incorporate state common law causes of action into that common law to further ERISA's policies.

The district court was correct in finding that ERISA preempted plaintiffs' state common law causes of action. We recognize that

"the preemptive effect of ERISA is broad, [but] it is not all-encompassing." *Lane v. Goren*, 743 F.2d 1337, 1339 (9th Cir. 1984). ERISA is, however, broad enough to preempt the causes of action upon which plaintiffs sought to rely. *See Lafferty v. Solar Turbines International*, 666 F.2d 408 (9th Cir. 1982) (common law breach of contract cause of action preempted by ERISA); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1215-16 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981) (Congress had preempted state common law claims of tortious interference with employee benefit plans).

V. Demand for Jury Trial

The trial judge's decision to strike plaintiffs' demand for jury trial will be reversed upon a showing of abuse of discretion. *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 621 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980). Since plaintiffs did not request a jury trial before this case was removed from state court, Fed. R. Civ. P. 38(b), made applicable by Rule 81(c), required plaintiffs to demand a jury trial within ten days from the filing of the last pleading concerned with the issues for which trial by jury is sought. The last pleading was Del Monte's answer, filed December 23, 1982. Plaintiffs filed a demand for a jury trial on March 1, 1983, almost two months late. Failure to file within the time provided constitutes a waiver of the right to trial by jury. Fed. R. Civ. P. 38(d).

Plaintiffs argue the district court abused its discretion in failing to grant relief from their unintentional waiver. The district court in its discretion may order a jury trial on a motion by a party who has not filed a timely demand for one. Fed. R. Civ. P. 39(b). That discretion is narrow, however, and does not permit a court to grant relief when the failure to make a timely demand results from an oversight or inadvertence. *Lewis v. Time, Inc.*, 710 F.2d 549, 556-57 (9th Cir. 1983). *See Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 675 (9th Cir. 1975) (the district court's discretion "should rarely be exercised to grant a trial by jury in default of a proper request for it"). Plaintiffs allege no reason for their failure to file a timely demand for jury trial. Nor is there an independent

constitutional or statutory right to jury trial in ERISA actions. *In re Vorpahl*, 695 F.2d 318 (8th Cir. 1982); *Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980); *Wardle v. Central States*, 627 F.2d 820, 828-30 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981). Thus, the district court did not abuse its discretion in striking plaintiffs' untimely demand for jury trial.

CONCLUSION

In light of the evidence of serious violations of ERISA by Del Monte, we find that Del Monte's decisions could not be said as a matter of law not to be arbitrary and capricious; because plaintiffs did not move for summary judgment, we need not decide whether plan administration so riddled with illegality makes the denial of benefits arbitrary and capricious as a matter of law. Hence, summary judgment was inappropriately granted at this stage of the proceedings. The grant of summary judgment is REVERSED and this cause is REMANDED to the district court for further proceedings upon plaintiffs' complaint.

Appendix D

United States Court of Appeals

For the Ninth Circuit

No. 83-2622
DC No. CV 82-6911 WHO

Barbara Blau, et al.,
Plaintiffs-Appellants,

v.

Del Monte Corporation, etc., et al.,
Defendants-Appellees.

ORDER

[Filed May 13, 1985]

Before: Duniway, Ferguson and Nelson, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Ferguson and Nelson voted to reject the suggestion for a rehearing en banc and Judge Duniway so recommended.

The full court has been advised of the suggestion for en banc hearing and a judge in active service requested that a vote be taken on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

Upon vote of the eligible judges in active service, a majority failed to vote for en banc rehearing.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Appendix E

ERISA

29 U.S.C. § 1001:

"(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and

to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

"(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts" (88 Stat. 832).

29 U.S.C. § 1002:

"For purposes of this subchapter:

"(1) The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

* * * * *

"(16)(A) The term 'administrator' means—

"(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

"(ii) if an administrator is not so designated, the plan sponsor; or

"(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

"(B) The term 'plan sponsor' means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

* * * * *

"(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title" (88 Stat. 833).

29 U.S.C. § 1022:

"(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of

the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

"(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024(a)(1) of this title. Any material modification in the terms of the plan and any change in the information described in subsection (b) of this section shall be filed in accordance with section 1024(a)(1)(D) of this title.

"(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title)" (88 Stat. 841).

29 U.S.C. § 1024:

* * * * *

"(b) Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

"(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary, plan description, and all modifications and changes referred to in section 1022(a)(1) of this title—

> "(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or
>
> "(B) if later, within 120 days after the plan becomes subject to this part.

"The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

"(2) The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the

plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

"(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 1023(b)(3) of this title and such other material as is necessary to fairly summarize the latest annual report.

"(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence" (88 Stat. 847).

29 U.S.C. § 1102:

"(a)(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

"(2) For purposes of this subchapter, the term 'named fiduciary' means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

"(b) Every employee benefit plan shall—

"(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

"(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c)(1) of this title),

"(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

"(4) specify the basis on which payments are made to and from the plan" (88 Stat. 875).

29 U.S.C. § 1103:

"(a) Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that—

"(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or

"(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102(c)(3) of this title.

"(b) The requirements of subsection (a) of this section shall not apply—

"(1) to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

"(2) to any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

"(3) to a plan—

"(i) some or all of the participants of which are employees described in section 401(c)(1) of Title 26; or

"(ii) which consists of one or more individual retirement accounts described in section 408 of Title 26, to the extent that such plan's assets are held in one or more custodial accounts which qualify under section 401(f) or 408(h) of Title 26, whichever is applicable;

"(4) to a plan which the Secretary exempts from the requirement of subsection (a) of this section and which is not subject to any of the following provisions of this Act—

"(A) part 2 of this subtitle,

"(B) part 3 of this subtitle, or

"(C) subchapter III of this chapter; or

"(5) to a contract established and maintained under section 403(b) of Title 26 to the extent that the assets of the contract are held in one or more custodial accounts pursuant to section 403(b)(7) of Title 26.

"(6) Any plan, fund or program under which an employer, all of whose stock is directly or indirectly owned by employees, former employees or their beneficiaries, proposes through an unfunded arrangement to compensate retired employees for benefits which were forfeited by such employees under a pension plan maintained by a former employer prior to the date such pension plan became subject to this chapter" (88 Stat. 876, 94 Stat. 1296, 1299, 1308).

29 U.S.C. § 1104:

"(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

"(A) for the exclusive purpose of:

"(i) providing benefits to participants and their beneficiaries; and

"(ii) defraying reasonable expenses of administering the plan;

"(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

"(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

"(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter" (88 Stat. 877, 94 Stat. 1296).

29 U.S.C. § 1132:

"(a) A civil action may be brought—

"(1) by a participant or beneficiary—

* * * * *

"(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * * * *

"(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section" (88 Stat. 891).

29 U.S.C. § 1133:

"In accordance with regulations of the Secretary, every employee benefit plan shall—

> "(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and
>
> "(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim" (88 Stat. 893).

29 Code of Federal Regulations

§ 2510.3-1:

"(a) *General.* (1) The purpose of this section is to clarify the definition of the terms 'employee welfare benefit plan' and 'welfare plan' for purposes of Title I of the Act and this chapter by identifying certain practices which do not constitute employee welfare benefit plans for those purposes. In addition, the practices listed in this section do not constitute employee pension benefit plans within the meaning of section 3(2) of the Act, and, therefore, do not constitute employee benefit plans within the meaning of section 3(3). Since under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3)

are subject to Title I of the Act, the practices listed in this section are not subject to Title I.

"(2) The terms 'employee welfare benefit plan' and 'welfare plan' are defined in section 3(1) of the Act to include plans providing '(i) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (ii) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions).' Under this definition, only plans which provide benefits described in section 3(1)(A) of the Act or in section 302(c) of the Labor-Management Relations Act, 1947 (hereinafter 'the LMRA') (other than pensions on retirement or death) constitute welfare plans. For example, a system of payroll deductions by an employer for deposit in savings accounts owned by its employees is not an employee welfare benefit plan within the meaning of section 3(1) of the Act because it does not provide benefits described in section 3(1)(A) of the Act or section 302(c) of the LMRA. (In addition, if each employee has the right to withdraw the balance in his or her account at any time, such a payroll savings plan does not meet the requirements for a pension plan set forth in section 3(2) of the Act and, therefore, is not an employee benefit plan within the meaning of section 3(3) of the Act).

"(3) Section 302(c) of the LMRA lists exceptions to the restrictions contained in subsections (a) and (b) of that section on payments and loans made by an employer to individuals and groups representing employees of the employer. Of these exceptions, only those contained in paragraphs (5), (6), (7) and (8) describe benefits provided through employee benefit plans. Moreover, only paragraph (6) describes benefits not described in section 3(1)(A) of the Act. The benefits described in section 302(c)(6) of the LMRA but not in section 3(1)(A) of the Act are '. . . holiday, severance or similar benefits'. Thus, the effect of section 3(1)(B) of the Act is to include within the definitions of

'welfare plan' those plans which provide holiday and severance benefits, and benefits which are similar (for example, benefits which are in substance severance benefits, although not so characterized)."

§ 2520.102-3:

"Section 102 of the Act specifies information that must be included in the summary plan description. The summary plan description must accurately reflect the contents of the plans as of the date not earlier than 120 days prior to the date such summary plan description is disclosed. The following information shall be included in the summary plan description of both employee welfare benefit plans and employee pension benefit plans, except as stated otherwise in paragraph (j) through (n):

"(a) The name of the plan, and, if different, the name by which the plan is commonly known by its participants and beneficiaries:

"(b) The name and address of—

"(1) In the case of a single employer plan, the employer whose employees are covered by the plan.

"(2) In the case of a plan maintained by an employee organization for its members, the employee organization that maintains the plan.

* * * * *

"(c) The employer identification number (EIN) assigned by the Internal Revenue Service to the plan sponsor and the plan number assigned by the plan sponsor. (For further detailed explanation, see the instructions to the plan description Form EBS-1 and 'Identification Numbers Under ERISA' (Publ. 1004), published jointly by DOL, IRS, and PBGC);

"(d) The type of pension or welfare plan, e.g., for pension plans—defined benefit, money purchase, profit sharing, etc.,

and for welfare plans—hospitalization, disability, pre-paid legal service, etc.;

"(e) The type of administration of the plan, e.g., control administration, insurer administration, etc.;

"(f) The name, business address and business telephone number of the plan administrator as that term is defined by section 3(16) of the Act;

"(g) The name of the person designated as agent for service of legal process, and the address at which process may be served on such person, and in addition, a statement that service of legal process may be made upon a plan trustee or the plan administrator;

"(h) The name, title and address of the principal place of business of each trustee of the plan;

* * * * *

"(j) The plan's requirements respecting eligibility for participation and for benefits. The summary plan description shall describe the plan's provisions relating to eligibility to participate in the plan, such as age or years of service requirements, and the items listed in paragraphs (j) (1) or (2) of this section as appropriate;

* * * * *

"(2) For employee welfare benefit plans, it shall also include a statement of the conditions pertaining to eligibility to receive benefits, and a description or summary of the benefits. In the case of a welfare plan providing extensive schedules of benefits (a medical care plan, for example), only a general description is required if reference is made to detailed schedules of benefits which are available without cost to any participant or beneficiary who so requests;

* * * * *

"(l) For both pension and welfare benefit plans, a statement clearly identifying circumstances which may result in disqualification, ineligibility, or denial, loss, forfeiture or suspension of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide on the basis of the description of benefits required by paragraphs (j) and (k) of this section.

* * * * *

"(s) The procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of Title I of the Act)."

§ 2560.503-1:

"(a) *Scope and purpose.* (1) This section sets out certain minimum requirements for employee benefit plan procedures pertaining to claims by participants and beneficiaries (claimants) for plan benefits, consideration of such claims, and review of claim denials, hereinafter referred to in the aggregate as 'claims procedures.' Except as otherwise noted, these requirements apply to every employee benefit plan described in section 4(a) and not exempted under section 4(b) of the Employee Retirement Income Security Act of 1974 (the Act).

"(b) *Obligation to establish a reasonable claims procedure.* Every employee benefit plan shall establish and maintain reasonable claims procedures.

"(1) A claims procedure will be deemed to be reasonable only if it:

"(i) Complies with the provisions of paragraphs (d) through (h) of this section, except to the extent that it is deemed to comply with some or all of such provisions under the authority of paragraph (b)(2) or paragraph (j) of this section.

"(ii) Is described in the summary plan description, as required by § 2520.102-3.

"(iii) Does not contain any provision, and is not administered in a way, which unduly inhibits or hampers the initiation or processing of plan claims, and

"(iv) Provides for informing participants in writing, in a timely fashion, of the time limits set forth in paragraphs (e)(3) and (g)(3) and paragraph (h) of this section.

* * * * *

"(d) *Filing of a claim for benefits.* For purposes of this section, a claim is a request for a plan benefit by a participant or beneficiary. A claim is filed when the requirements of a reasonable claim filing procedure of a plan have been met. If a reasonable procedure for filing claims has not been established by the plan, a claim shall be deemed filed when a written or oral communication is made by the claimant or the claimant's authorized representative which is reasonably calculated to bring the claim to the attention of:

"(1) In the case of a single employer plan, either the organizational unit which has customarily handled employee benefits matters of the employer, or any officer of the employer.

"(2) In the case of a plan to which more than one unaffiliated employer contributes, or which is established or maintained by an employee organization, either the joint board, association, committee or other similar group (or any member of any such group) administering the plan, or the person or organizational unit to which claims for benefits under the plan customarily have been referred.

* * * * *

"(4) For purposes of paragraphs (d)(1), (2), and (3) of this section, a communication shall be deemed to have been brought to the attention of an organizational unit if it is received by any person employed in such unit.

"(e) *Notification to claimant of decision.* (1) If a claim is wholly or partially denied, notice of the decision, meeting the requirements of paragraph (f) of this section, shall be furnished to the claimant within a reasonable period of time after receipt of the claim by the plan.

"(2) If notice of the denial of a claim is not furnished in accordance with paragraph (e)(1) of this section within a reasonable period of time, the claim shall be deemed denied and the claimant shall be permitted to proceed to the review stage described in paragraph (g) of this section.

"(3) For purposes of paragraphs (e)(1) and (2), of this section, a period of time will be deemed to be unreasonable if it exceeds 90 days after receipt of the claim by the plan, unless special circumstances require an extension of time for processing the claim. If such an extension of time for processing is required, written notice of the extension shall be furnished to the claimant prior to the termination of the inital 90-day period. In no event shall such extension exceed a period of 90 days from the end of such initial period. The extension notice shall indicate the special circumstances requiring an extension of time and the date by which the plan expects to render the final decision.

"(f) *Content of notice.* A plan administrator or, if paragraph (c) of this section is applicable, the insurance company, insurance service, or other similar organization, shall provide to every claimant who is denied a claim for benefits written notice setting forth in a manner calculated to be understood by the claimant:

"(1) The specific reason or reasons for the denial;

"(2) Specific reference to pertinent plan provisions on which the denial is based;

"(3) A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary; and

"(4) Appropriate information as to the steps to be taken if the participant or beneficiary wishes to submit his or her claim for review.

"(g) *Review procedure.* (1) Every plan shall establish and maintain a procedure by which a claimant or his duly authorized representative has a reasonable opportunity to appeal a denied claim to an appropriate named fiduciary or to a person designated by such fiduciary, and under which a full and fair review of the claim and its denial may be obtained. Every such procedure shall include but not be limited to provisions that a claimant or his duly authorized representative may:

"(i) Request a review upon written application to the plan;

"(ii) Review pertinent documents; and

"(iii) Submit issues and comments in writing.

"(2) To the extent that benefits under an employee benefit plan are provided or administered by an insurance company, insurance service, or other similar organization which is subject to regulation under the insurance laws of one or more States, the claims procedure pertaining to such benefits may provide for review of and decision upon denied claims by such company, service or organization. In such case, that company, service, or organization shall be the 'appropriate named fiduciary' for purposes of this section. In all other cases, the 'appropriate named fiduciary' for purposes of this section may be the plan administrator or any other person designated by the plan, provided that such plan administrator or other person is either named in the plan instrument or is identified pursuant to a procedure set forth in the plan as the person who reviews and makes decisions on claim denials.

"(3) A plan may establish a limited period within which a claimant must file any request for review of a denied claim. Such time limits must be reasonable and related to the nature of the benefit which is the subject of the claim and to other attendant circumstances. In no event may such a period expire less than 60 days after receipt by the claimant of written notification of denial of a claim.

"(h) *Decision on review.* (1)(i) A decision by an appropriate named fiduciary shall be made promptly, and shall not ordinarily be made later than 60 days after the plan's receipt of a request for review, unless special circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing) require an extension of time for processing, in which case a decision shall be rendered as soon as possible, but not later than 120 days after receipt of a request for review.

"(ii) In the case of a plan with a committee or board of trustees designated as the appropriate named fiduciary, which holds regularly scheduled meetings at least quarterly, a decision on review shall be made by no later than the date of the meeting of the committee or board which immediately follows the plan's receipt of a request for review, unless the request for review is filed within 30 days preceding the date of such meeting. In such case, a decision may be made by no later than the date of the second meeting following the plan's receipt of the request for review. If special circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing) require a further extension of time for processing, a decision shall be rendered not later than the third meeting of the committee or board following the plan's receipt of the request for review.

"(2) If such an extension of time for review is required because of special circumstances, written notice of the extension shall be furnished to the claimant prior to the commencement of the extension.

"(3) The decision on review shall be in writing and shall include specific reasons for the decision, written in a manner calculated to be understood by the claimant, as well as specific references to the pertinent plan provisions on which the decision is based.

"(4) The decision on review shall be furnished to the claimant within the appropriate time described in paragraph (h)(1) of this section. If the decision on review is not furnished within such time, the claim shall be deemed denied on review."